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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 415

CAROLYN BRADLEY, *et al.*,

Petitioners,

—v.—

THE SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cause on April 7, 1965.

Citations to Opinions Below

The memorandum opinion of the District Court of July 25, 1962 (R. I-61)[1] is unreported and is printed in the appendix hereto, *infra* p. 1a. The opinion of the Court of Appeals issued May 10, 1963 (R. I-76), printed in the ap-

[1] The record contains Volumes I to VI. Each volume begins with a page numbered 1. Thus record citations herein are to the volume and page number as above indicating Volume I, page 61.

pendix hereto, *infra* p. 9a, is reported at 317 F. 2d 429. The District Court's opinion of March 16, 1964 (R. I-128), appears in the appendix below at page 29a. The second opinion of the Court of Appeals dated April 7, 1965 (R. V-5), printed in the appendix p. 40a, *infra,* is reported at 345 F. 2d 310.

Jurisdiction

The judgment of the Court of Appeals was entered on April 7, 1965 (R. V-36); appendix p. 71a, *infra.* Mr. Justice Goldberg on June 28, 1965, extended the time for filing the petition for certiorari until August 1, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

1. Whether the Richmond, Virginia school board's "freedom of choice" policy is adequate under *Brown* v. *Board of Education* to disestablish the system of racial segregation created by past compulsory pupil assignment policies in the context of a continuing practice of assigning all school teachers on the basis of race in a segregated pattern.

2. Whether Negro pupils are entitled to demand a prompt end to the school authorities' practice of racially segregating teachers by assigning them on the basis of race as a violation of the pupils' right to attend a nondiscriminatory public school system.

Statutes and Constitutional Provisions Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement

This cause was filed in the United States District Court for the Eastern District of Virginia September 5, 1961, by petitioners, a group of Negro parents and children in Richmond, Virginia, who sought injunctive relief against public school segregation pursuant to 28 U. S. C. §1343 and 42 U. S. C. §§1981 and 1983.[2] Petitioners sought an injunction against the Richmond school board and superintendent and against the Virginia Pupil Placement Board, a state agency with statutory responsibilities concerning the assignment of pupils. Petitioners here seek a review of the adequacy of the school board's desegregation plan which was approved by the courts below.

The complaint, brought as a class action under Rule 23(a), F. R. Civ. Proc., alleged, *inter alia,* that the school authorities had not devoted efforts toward initiating non-segregation and bringing about the elimination of racial discrimination in the public school system and that they had not "made a reasonable start to effectuate a transition to a racially non-discriminatory system . . ." (R. I-11).

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[2] The complaint also alleged "Federal Question" jurisdiction under 28 U. S. C. §1331.

The complaint as amended[3] requested an order requiring admission of the 11 minor petitioners in specified all-white schools and also general injunctive relief against the segregated system and discriminatory practices. It included a request that the defendants be required to submit to the court a desegregation plan as well as periodic reports of their progress in effectuating a transition to a racially nondiscriminatory school system (R. I-36-37). Petitioners also sought attorneys' fees. The defendants generally denied that petitioners were entitled to relief; the Richmond officials contended that sole responsibility for placing pupils was in the hands of the defendant Pupil Placement Board (R. I-53, 55).

July 23, 1962, the case was tried before Hon. John D. Butzner, Jr.,[4] and on July 25, 1962, Judge Butzner filed an opinion (R. I-61) and entered an injunction (R. I-71) against the defendants requiring the admission of ten petitioners to white schools,[5] but refusing any general injunction against discrimination.

Although all of the petitioners were thereby admitted to white schools, they appealed the refusal to enter general injunctive relief and to require a desegregation plan. The Fourth Circuit (Judge Bryan dissenting) reversed and remanded, directing entry of an injunction against the discriminatory practices and indicating that the school board

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[3] Following motions to dismiss the original complaint (R. I-15, 20) the complaint was amended January 4, 1962 (R. I-26). The amended complaint alleged facts concerning the applications of the individual plaintiffs' admission to specified schools.

[4] The transcript of the trial of July 23, 1962, is Vol. II of the record.

[5] The remaining infant petitioner had been admitted by the school authorities prior to the hearing.

should be encouraged to submit a more definite plan for termination of the discriminatory system (317 F. 2d 429, May 10, 1963). The majority opinion contains a detailed factual statement describing the segregated operation of the Richmond schools, and the limited first steps which had departed from total segregation. It referred to earlier school segregation litigation in Richmond from 1958 to 1961 culminating in the admission of 1 Negro to a white school by an order of District Judge Lewis, refusing any class relief and dismissing the prior case from the docket.[6] The Court of Appeals concluded that it found "nothing to indicate a desire or intention to use the enrollment or assignment systems as a vehicle to desegregate the schools" and that the refusal to enter an injunction left the defendants "free to ignore the rights of other applicants" for nonracial assignments.

When the present case commenced in September 1961 Richmond had 41,568 children (17,777 white and 23,791 Negro)[7] attending 61 schools.[8] Only 37 Negro children were

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[6] The Court of Appeals' description of the prior case is in 317 F. 2d at 432, n. 3, 435. The prior suit, *Warden* v. *School Board of City of Richmond* (E. D. Va., July 5, 1961), unofficially reported 6 Race Rel. L. Rep. 1025, was filed September 2, 1958, by Negro pupils who had been denied admission in two white schools. As the Fourth Circuit observed, the school board converted the white school which most of the plaintiffs sought to enter to a Negro school by transferring out its white students and faculty and moving in Negro students and faculty. A single remaining plaintiff who sought transfer from a Negro school *five miles* from her home to a white school in her neighborhood finally obtained admission by the court order entered July 5, 1961, three years after her original application. (School Board Minutes pertaining to the 1958 events described are Pl's Exhibits 16 and 17 in the present record.)

[7] Pl's Exhibit 8, Depositions of Willet, *et al.* p. 8 (hereinafter cited as Deposition).

[8] (R. I-43-44.)

assigned with whites at three schools (R. I-45-46). The first desegregation had begun in the 1960-61 term with 2 Negroes in white schools. Judge Butzner's opinion described the manner in which pupils were initially placed in schools and promoted from one to another on the basis of race through use of dual overlapping attendance areas for Negroes and whites. It also described the discriminatory application of transfer criteria to those Negro pupils who actively sought admission to white schools (R. I-62-64, 66-68). Although the local school board professed not to have assignment power, it continued to maintain dual attendance areas adopted before the *Brown* decision which governed an estimated 98% of the children who were placed routinely by the Pupil Placement Board in accord with the locally established pattern. The routine placement of Negroes in all-Negro schools was sought to be justified at the trial by the authorities on the theory that Negroes preferred segregation. Chairman Oglesby of the Placement Board testified (R. II-54-55):

> Normally, I would say fully 99 per cent of the Negro parents who are entering a child in First Grade prefer to have that child in the Negro school.
>
> * * * * *
>
> And it is true that in general there will be two schools that that child could attend in his area, one white and one Negro, and we assume that the Negro wants to go to the Negro school unless he says otherwise, but if he says otherwise, he gets the other school.

Pupils who sought transfers out of the zones were judged by the Pupil Placement Board's transfer standards. This

involved, the court found, the rejection of Negro transfer applications on academic and residence standards not applied to white pupils routinely enrolled in the same schools (R. I-65-68).

Richmond pupils had been assigned to schools on the basis of separate overlapping attendance areas for Negroes and whites for many years.[9] Maps indicating the location of schools and the areas for the high schools (Pl's Ex. 5), junior high schools (Pl's Ex. 6) and elementary schools (Pl's Ex. 7) were introduced in evidence. Plaintiffs also introduced school census data showing that Negroes and whites lived in the same neighborhoods in many sections of the City.[10]

The faculties in the white pupil schools were all white, and the schools with Negro students had all Negro teachers (Deposition 13). The school board's Rules and Regulations describe the personnel policies and procedures (Pl's Ex. 1 at p. 28):

* * * * *

2. Assignment of Employees.

Each employee of the school board shall be assigned to a specific position by and under the direction of the superintendent of schools and may be transferred to any other position for which qualified.

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[9] Testimony at pp. 27-28 illustrates the operation of the overlapping zones, where white pupils and Negroes in the same areas attend different schools.

[10] See generally R. II-12-24 explaining Pl's Exhibits 12-15. Exhibit 14, a plastic overlay, indicates the number of white and Negro pupils by age group in each section of the City, and can be compared with the school attendance areas when placed over Exhibits 5, 6 or 7.

3. Transfer of employees.

Transfer may be made by the superintendent on his own authority or at the request of the employee for any purpose which in the judgment of the superintendent is for the welfare of the employee or the schools.

A statement of "Richmond Public Schools Administrative Policies" (attached to Pl's Ex. 1) indicates that the responsibility for personnel selection is shared by the administration, Personnel Department and the school principal or department head concerned. Teachers in Richmond are given ten month contracts, serve a two year probation when first employed, and thereafter usually have continuing contracts which are renewed unless they are notified to the contrary by April 15th of each year. (See Pl's Ex. 1, Rules and Regulations, Ch. VI, pp. 24-31.)

The evidence showed a pattern of severe overcrowding in Negro schools and under-utilization of white schools. As the Court of Appeals observed (317 F. 2d at 435), the authorities had not dealt with overcrowding by assigning Negro pupils to schools with white children which had available space in the same areas (R. II-32). Instead, they built new schools for Negroes and converted white schools to all-Negro schools (*ibid.*). At the time of the trial 90 Negro children had been granted transfers to white schools for the 1962-63 term in addition to the 37 enrolled during the 1961-62 year (R. II-77-78).

After the Fourth Circuit remanded the case the district court entered an order June 6, 1963, enjoining the defendants from refusing the admission of any pupil to any

public school on the basis of race, from assigning pupils on the basis of dual overlapping zones, from assigning pupils on the basis of race upon promotion from one school to another, and from conditioning the grant of transfers on the applicants' submission to futile, burdensome or discriminatory procedures (R. I-97-98). The court also invited the defendants to submit a desegregation plan, and stipulated that the injunction would be superseded by an approved plan (R. I-98).

On July 11, 1963, plaintiffs moved for further injunctive relief challenging the school board's action in assigning pupils for the forthcoming term in accord with a resolution the board had adopted March 18, 1963 (R. I-100). At the hearing on this motion on July 29, 1963 (R. Volume III), the school board filed its March 18, 1963 resolution and requested that the court approve it as a plan of desegregation (Defendants' Ex. 1 and 1a). The full text of the resolution is set out in the margin.[11]

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[11] "Whereas, the Richmond School Board has been advised by special counsel and the City Attorney that in order to comply with the decision of the Federal District Court in the case of Bradley v. The School Board of the City of Richmond and the State Pupil Placement Board, the school attendance areas previously established for white and Negro schools may no longer be used in the assignment of pupils.

"Now, Therefore, be it Resolved as follows:

"(a) Recommendations for assignment of pupils seeking enrollment in the public school system for the first time or initial enrollment in the junior or senior high schools shall be made upon consideration of the distance the pupils live from such schools; the capacity of such school; availability of space in other schools; whether the program of the pupil can be met by such school; the school preference as shown on the pupil placement application form; and what is deemed to be in the best interest of such pupil.

"(b) The school administration shall recommend that pupils be assigned to the schools which they attended the preceding

At the hearing the superintendent testified that for the then forthcoming 1963-64 term dual attendance zones had been abolished and no new zones were adopted (R. III-6, 8); that all pupils entering school were required to apply for a specific school (R. III-8); that every child finishing the top grade in elementary school or junior high school was required to choose a school (*ibid.*); that no Negro applicant to a white school was denied admission (*ibid.*); that the only criteria applied thus far were school capacity (but this had not resulted in denial of any Negro application to a white school) (R. III-10) and a May 31st deadline for transfers (R. III-12); that pupils enrolled in a school continued in that school unless they requested to move out or reached the top grade (R. III-17-18); that a total of 239 Negroes applied before the deadline and were admitted at white schools (148 finishing highest grade in school, 81 in grades below top grade, 10 beginning school) (R. III-22).[12]

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year, except those eligible for promotion to another school. However, application may be made by the parent, guardian or other person having custody of such pupils for their placement in another school named in the application in which case the reason for the requested transfer should be stated. The school administration may recommend to the Pupil Placement Board that such application be approved if it be deemed to be in the best interest of the pupil.

"(c) Applications for transfers to a particular school must be made and received by the school administration before June 1 preceding the school year to which the placement requested is to be applicable." (Defendant's Exhibits 1 and 1a.)

[12] No current figures on Richmond desegregation are in the record. A published report indicates that in November 1964 there were 846 Negro children attending 13 schools with white children. This represented about 3% of the Negroes in the system. Southern Education Reporting Service, "Statistical Summary of School Segregation—Desegregation in the Southern and Border States", 14th Rev., Nov. 1964, p. 59.

After hearing this testimony the Court set dates for the petitioners to file exceptions to the plan as it had been explained and indicated it would schedule a further hearing on the proposed plan.

On August 22, 1963, plaintiffs filed exceptions to the plan attacking it as vague and indefinite and conferring absolute discretion on the school authorities to determine assignments, and asserting that as the plan had no specific school zones the plan "affords the Court no basis upon which to appraise the practical impact of an order approving the plan or any part of it" (R. I-110-111). The petitioners objected to the provision granting transfers if "deemed to be in the best interest of the pupil" and also objected that the plan "omits any provision for the assignment or reassignment of teachers and staff of the schools on a nonracial basis" saying they were asserting "their personal rights to attend a school system in which there is no racial segregation or discrimination" (R. I-112).

September 9, 1963, plaintiffs filed a motion for a temporary restraining order to require the admission at a white high school of two Negro pupils who had been denied transfers on the ground that their applications were not received before the deadline. The Court granted the restraining order on the basis of the prior injunction (R. I-123), and it was subsequently made permanent (R. I-143-144).

On December 20, 1963, there was a further hearing on the plan and on petitioners' motion for attorneys' fees (R. Volume IV). By agreement prior evidence was considered part of the evidence on the plan. The application forms were placed in evidence;[13] the superintendent indicated that

[13] Curiously, the statewide Pupil Placement form (Def's Ex. 3) has no space designated for pupils to indicate the school they desire

pupils other than those completing the last grade in a school were asked to state the reason they sought a transfer. The superintendent stated that in 1963 there was one instance in which about 40 or 50 white children applied to a school that was overcrowded and "the parents were consulted" but no one was "sent to a school against his will" (R. IV-10). Counsel for the Pupil Placement Board advised the Court that that board approved the plan (R. IV-19).

The superintendent testified at the July hearing that the school board's purpose was to follow a "freedom of choice" plan similar to the one in Baltimore, and that the board had been guided in this by a suggestion made by the Fourth Circuit in the Charlottesville[14] case (R. III-7).

On March 16, 1964, Judge Butzner approved the plan and dissolved the injunction entered June 6, 1963 (R. I-128). The Court said that while the plan was framed in broad language, it was valid as it was being administered and interpreted; that the "best interest" criterion could not be used to deny transfers or admission unless made more definite; and that the school capacity criterion presented no problem at present but that if the situation changed residential requirements must avoid discrimination. The Court said that the absence of provision for faculty desegregation did not require rejection of a plan for the assignment of pupils.

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to attend. But the superintendent testified that all parents were required to indicate the school they chose when the child entered school or finished the highest grade in a school.

[14] *Dillard* v. *School Board of the City of Charlottesville,* 308 F. 2d 920, 923-924 (4th Cir. 1962), *cert. denied* 374 U. S. 827.

On petitioners' appeal the Fourth Circuit, *en banc*, affirmed, with Judges Sobeloff and Bell dissenting in part (345 F. 2d 310; appendix 40a). The Court held that the plan allowing "free transfers is an acceptable device for achieving a legal desegregation of schools," noting that the Court required "the elimination of discrimination from initial assignments as a condition of approval of a free transfer plan" and that "discrimination is eliminated as readily by a plan under which each pupil initially assigns himself as he pleases as by a plan under which he is involuntarily assigned on a geographic system" (345 F. 2d at 318-319). The court said that the board might have established a single zone system for initial placements but that "would have been a major task" and that eliminating zoning was the equivalent of rezoning and "easier of accomplishment" when the board intended to allow pupils to choose schools in any event (*ibid.*).

The Court held that the District Court did not abuse its discretion in declining to order staff desegregation, stating that there was no inquiry "as to the possible relation, in fact or in law, of teacher assignments to discrimination against pupils" or as to the impact of an order upon the administration of the schools, and thus petitioners had not "discharged the burden they must shoulder of showing that such assignments effect a denial of their constitutional rights" (345 F. 2d at 320). The Court said, in part:

> Whether and when such an inquiry is to be had are matters with respect to which the District Court also has a large measure of discretion. The Fifth and Sixth Circuits have so held, and we agree. When direct measures are employed to eliminate all direct discrimi-

> nation in the assignment of pupils, a District Court may defer inquiry as to the appropriateness of supplemental measures until the effect and the sufficiency of the direct ones may be determined. The possible relation of a reassignment of teachers to protection of the constitutional rights of pupils need not be determined when it is speculative. When all direct discrimination in the assignment of pupils has been eliminated, assignment of teachers may be expected to follow the racial patterns established in the schools (*ibid.*) (footnotes omitted).

The Court affirmed the disallowance of counsel fees as within the trial judge's discretion saying that an award was required "only in the extraordinary case" (*id.* at 321).

Judges Sobeloff and Bell concurred in approval of the freedom of choice plan but made their "concurrence tentative on the assumption that the Resolution is an interim measure only and will be subject to a full review and reappraisal at the end of the present school year, or certainly not later than this fall after the opening of the 1965-66 school term, when the results of two years of the Resolution's operation will be known" (345 F. 2d at 321). They said that they were "not fully persuaded that the plan will be enough to enable the Negro pupils to extricate themselves from the segregation which has long been firmly established and resolutely maintained in Richmond" (*id.* at 322), and that much depended upon the board's attitude, which in the past had been that it had no duty "to integrate a particular school or desegregate it" or "to promote integration." They asserted that "good faith compliance requires administrators of schools to proceed actively with

their nontransferable duty to undo the segregation which both by action and inaction has been persistently perpetuated" (*id.* at 323).

Judges Sobeloff and Bell dissented from the rulings concerning staff desegregation, the dissolution of the 1963 injunction, and counsel fees. On the teacher issue they wrote (*id.* at 324):

> The composition of the faculty as well as the composition of its student body determines the character of a school. Indeed, as long as there is a strict separation of the races in faculties, schools will remain "white" and "Negro," making student desegregation more difficult. The standing of the plaintiffs to raise the issue of faculty desegregation is conceded. The question of faculty desegregation was squarely raised in the District Court and should be heard. It should not remain in limbo indefinitely. After a hearing there is a limited discretion as to when and how to enforce the plaintiffs' rights in respect to this, as there is in respect to other issues, since administrative considerations are involved; but the matter should be inquired into promptly. There is no legal reason why desegregation of faculties and student bodies may not proceed simultaneously.

Reasons for Granting the Writ

This case involves two of the issues of greatest current concern in school segregation litigation throughout the South, the question of the adequacy of so-called freedom of choice desegregation plans to disestablish patterns of racial segregation created by governmental compulsion in the context of continuing faculty segregation, and the right of Negro pupils to demand a prompt end of the practice of assigning teachers on the basis of the race of the pupils in schools. Adoption of the Richmond plan and approval of it by the Fourth Circuit has been emulated widely by school districts and courts. At least four cases involving comparable issues already have been decided by the Fourth Circuit, and the views expressed in the Richmond case have been reaffirmed.[15] Indeed, the major new phenomenon in school desegregation litigation is the sudden abandonment of age-old normal school zoning practices and adoption of so-called free choice plans.

The issue of faculty desegregation is of transcendent importance in thousands of school districts where teachers are still assigned on the basis of race in a segregated pattern. The United States Commissioner of Education, as authorized by Title VI of the Civil Rights Act of 1964,[16]

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[15] See, e.g., *Bowditch* v. *Buncombe County Board of Education*, 345 F. 2d 429 (4th Cir. 1965); *Nesbit* v. *Statesville City Board of Education*, 345 F. 2d 333 (4th Cir. 1965); *Brown* v. *County School Board of Frederick County*, —— F. 2d —— (4th Cir. No. 9825, May 24, 1965); *Wheeler* v. *The Durham City Board of Education*, —— F. 2d —— (4th Cir. No. 9630, June 1, 1965).

[16] Title VI conditions federal financial assistance on nondiscrimination. Act of July 2, 1964, P. L. 88-352, Title VI, 72 Stat. 252, 42 U. S. C. A. §2000d, *et seq.*

has adopted a rule requiring that all desegregation plans submitted by districts receiving federal financial assistance "shall provide for the desegregation of faculty and staff" by making "initial assignments" nonracially and by steps toward the elimination of teacher and staff segregation resulting from prior assignments based on race.[17] It is important that this Court announce a similar unequivocal position against faculty segregation practices to establish a uniform rule for those districts in litigation (and submitting court approved plans as the basis for federal aid) and those submitting plans to the Commissioner of Education. The Congressional proponents of the Civil Rights Act of 1964 proceeded on the express assumption that the Commissioner could require faculty desegregation. Introducing Title VI, Vice President (then Senator) Humphrey made express reference to a Fifth Circuit opinion requiring faculty desegregation which this Court had declined to review, saying:

> In such cases the Commissioner might also be justified in requiring elimination of racial discrimination in employment or assignment of teachers at least where such discrimination affected the educational opportunities of students. See *Board of Education* v. *Braxton* [326 F. 2d 616 (5th Cir. 1964)].
>
> This does not mean that Title VI would authorize a federal official to prescribe pupil assignments, or to

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[17] General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools, HEW, Office of Education, April 1964, Part V. B(1) (cited hereinafter as General Policy Statement). This Statement is reprinted in the appendix to *Price* v. *The Denison Independent School District*, —— F. 2d —— (5th Cir. No. 21632, July 2, 1965), and also in *Southern School News*, May 1958, p. 8.

> select a faculty, as opponents of the bill have suggested. The only authority conferred would be authority to adopt, with the approval of the President, a general requirement that the local school authority refrain from racial discrimination in treatment of pupils and teachers and authority to achieve compliance with that requirement by cutting off funds or by other means authorized by law. (110 Cong. Rec. 6325 (daily ed. March 30, 1964))

However, the prospect of federal administrative pressure for faculty desegregation does not eliminate the urgent need for a similar expression from this Court. First, with respect to particular districts in litigation, the Commissioner of Education has indicated that a "final order of a court of the United States" will be accepted in lieu of a plan submitted to the agency (General Policy Statement, parts II.B and IV). Court orders finally approving plans which fail to contain basic provisions like faculty desegregation will work to create conflict. As Judge Wisdom of the Fifth Circuit recently wrote:

> The judiciary has of course functions and duties distinct from those of the executive department, but in carrying out a national policy we have the same objective. There should be a close correlation, therefore, between the judiciary's standards in enforcing the national policy requiring desegregation of public schools and the executive department's standards in administering this policy. . . . If in some district courts judicial guides for approval of a school desegregation plan are more acceptable to the community or substantially less burdensome than H. E. W. guides, school

boards may turn to the federal courts as a means of circumventing the H. E. W. requirements for financial aid. (*Singleton* v. *Jackson Municipal Separate School District*, —— F. 2d ——, 5th Cir. No. 22,527, June 22, 1965.)

Second, with respect to general standards the Commissioner obviously will be guided to some substantial degree by the legal principles emanating from the courts. Judicial declarations casting doubt on the necessity for faculty desegregation might immeasurably impair and stir resistance to the effective administration of the Commissioner's existing policy implementing the Act of Congress.

I.

The Richmond Pupil Assignment Plan, Viewed in the Context of Continuing Faculty Segregation and Other Factors, Is Fundamentally Inadequate to Disestablish the Segregated System of Schools.

Richmond's plan for assigning pupils, or rather, not assigning them, to schools is basically inadequate to effectuate the constitutionally required transition of a racially segregated school system to one operated without discrimination. There is no question here of the right of a school board in the abstract to allow pupils to choose their schools. The question is whether adoption of a policy providing for pupils to choose their schools is adequate to undo the effects of past wrongs, and discharge the duty to eliminate a segregated system. Petitioners submit that a school board does not adequately discharge its affirmative duty to initiate desegregation when, after years of actively placing pupils in schools on a segregated basis,

it adopts a "hands-off" attitude about pupil placements while maintaining faculty segregation in the schools.

Richmond traditionally has placed pupils in schools by the use of geographic attendance areas, allowing pupils choice in some situations between two schools in the same vicinity. Separate schools and attendance areas were maintained for Negroes. The totally segregated situation existing before, and for a number of years after, *Brown* v. *Board of Education*, 347 U. S. 483, was entirely the work of state agents. The authorities' attempt to evade compliance with *Brown* through grossly discriminatory application of the Virginia Pupil Placement law is spread on the record of this case, and recounted in the first opinion of the court below (317 F. 2d 429). In the era before the courts finally denounced use of the "pupil placement laws" to maintain segregation by initial placements based on race and discriminatory transfer procedures for those who sought to escape segregation,[18] segregationist school boards widely proclaimed as the utmost wisdom a judicial declaration that "[s]omebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge" (*Carson* v. *Warlick*, 238 F. 2d 724 (4th Cir. 1956)).

Faced with judicial condemnation of their pupil placement scheme, and the knowledge that assignment of chil-

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[18] See, for example, *Green* v. *School Board of City of Roanoke*, 304 F. 2d 118 (4th Cir. 1962); *Dodson* v. *School Board of City of Charlottesville*, 289 F. 2d 439 (4th Cir. 1961); *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491, 498 (5th Cir. 1962); *Northcross* v. *Board of Education of Memphis*, 302 F. 2d 818 (6th Cir. 1962).

dren by fairly drawn geographic areas in Richmond would result in desegregation of a substantial number of schools and the assignment of white children to Negro schools,[19] the authorities have announced the principle of "free choice." They have done so fortified by the knowledge that social pressure will tend to preserve much of the pattern of segregation, their theory that "99 per cent of the Negro parents . . . prefer . . . the Negro school" (R. II-54), and the continued practice of faculty segregation which proclaims the pattern the state has struggled to preserve, so that no one can mistake a "Negro school" or a "white school."

Faculty segregation is the key factor in the equation. It racially identifies schools as effectively as a sign over the door and enables the plan to offer parents a choice between a Negro-faculty school and a white-faculty school. Continued faculty segregation obviously discourages whites from attending Negro schools no matter how accessible or convenient. The principal implication of segregation practices, that Negroes are considered inferior and unfit to associate with whites, is surely not lost on white parents confronted with a school board policy which indicates by its very existence that the race of teachers makes a difference and is something to be taken into account in organizing schools. Cf. *Anderson* v. *Martin*, 375 U. S. 399. Nor is it lost on Negro parents that the school authorities are moving only grudgingly under pressure, clinging to vestiges of the segregated system to make it clear that at least as a gross proposition Negro pupils enter white schools

[19] See the maps and overlays indicating the number of pupils in various areas of the city discussed in note 10, *supra*.

as unwelcome aliens, and that the school board will never take the initiative to put them there. Negroes know that Negro teachers face a diminishing need for their services to the extent that Negro pupils choose desegregated schools if Negroes are excluded from the possibility of assignments to teach white children. Teachers who are a significant portion of the Negro leadership group are thus faced with a cruel dilemma by the school authorities.

A basic effect of the free choice plan—especially when combined with faculty segregation—is to perpetuate the all-Negro school. The board knows that there are no applications by whites to attend Negro schools. It also knows that although initially white schools have the capacity to absorb some Negro pupils in vacant seats, that capacity is finite and indeed very limited when compared with the total number of Negro pupils. The promise to deal with such an overcrowding by prescribing attendance zones or some geographic standard if more Negroes apply to a white school than it can hold, is no complete answer. It apparently ignores the obligation of the school board to prevent overcrowding in Negro schools by assigning Negro pupils to nearby white schools with vacant space in order to provide an equal educational opportunity in both schools. The school board's theory that it will not force Negro children to go to school with whites and that there is nothing wrong with "voluntary" pupil segregation, coupled with mandatory teacher segregation, runs afoul of its obligation to provide equal educational opportunity without regard to race.

The so-called freedom of choice—joined with staff segregation—plan represents a partial abdication of the school

board's duty to insure equal education by equal utilization and allocation of available facilities. There is no evidence to support, and good reason to doubt, the conclusion of the court below that a free choice plan is "administratively, far easier of accomplishment" than a plan of initially placing pupils in schools. It is as reasonable to think that large numbers of transfers would make planning for the future infinitely more difficult and complicated, and render useless the normal type of projections of school enrollments used in school building plans and the like under the previous zoning system. (See Pl's Ex. 2—the school board's five year projection of enrollments in each school from the 1962-63 to 1966-67 term.) The projected administrative feasibility of the freedom of choice plan seems clearly linked to an expectation that relatively few of the more than 23,000 Negroes in the system will transfer to white schools.

None of the above is intended to deny a school board's abstract, hypothetical, right to adopt a free choice plan in other circumstances. The school board relies on the fact that Baltimore used such a plan. As Judges Sobeloff and Bell pointed out in their concurring opinion, Baltimore had an entirely different official response to the *Brown* decision than Richmond did. And Baltimore, which had free choice before *Brown,* desegregated its faculties.[20] The majority below apparently rejects the suggestion of Judges Sobeloff and Bell that the free choice plan cannot be properly appraised until experience indicates how it works, and seems

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[20] "Statistical Summary of School Segregation—Desegregation," *supra,* p. 31, indicates Baltimore City had 2,052 Negro teachers in desegregated positions.

to decide that the method of allowing parents to choose schools is unobjectionable *per se* and thus it does not matter to what extent the method actually desegregates the school system. It should be noted that the Commissioner of Education, while indicating that freedom of choice plans as well as other types of plans may be submitted to the Office of Education, has served advance notice that actual performance will be a test in evaluating plans to determine if they accomplish the purposes of the Civil Rights Act (General Policy Statement, *supra,* part V. B.(6)), and that periodic compliance reports will be required.

Courts of equity have in other circumstances required wrongdoers to do more than cease their unlawful activities and compelled them to take further affirmative steps to undo the effects of their wrongdoing. This Court only recently approved such a decree in *Louisiana* v. *United States,* 380 U. S. 145, 154, saying:

> [T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

Analogies exist under the Sherman Antitrust Act, where unlawful combinations are commonly dealt with through dissolution and stock divestiture decrees (see, e.g. *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 189, and cases cited), and under the National Labor Relations Act where it was early recognized that disestablishment of an employer-dominated labor organization "may be the only effective way of wiping the slate clean and affording the employees an opportunity to start afresh in organizing . . ." (*N. L. R. B.* v. *Newport News Shipbuilding & Dry*

Dock Co., 308 U. S. 241, 250).[21] Similar equitable principles should be applied here where the school board has adopted the method of operation least calculated to extend a desegregated education to large numbers of pupils.

II.

Segregation of Public School Teachers Violates the Fourteenth Amendment and Negro Pupils Are Entitled to Relief Against This Element of Segregated School Systems.

The segregation of public employees by race plainly violates the Fourteenth Amendment under principles settled in *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294, and the long line of cases applying the Amendment to prohibit all racial discrimination by the states.[22] Discrimi-

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[21] See also *American Enka Corp.* v. *N. L. R. B.*, 119 F. 2d 60, 63 (4th Cir. 1941). In *Sperry Gyroscope Co. Inc.* v. *N. L. R. B.*, 129 F. 2d 922, 931-932 (2nd Cir. 1942), Judge Jerome Frank compared Labor Board orders requiring disestablishment of company-dominated unions to "the doctrine of those cases in which a court of equity, without relying on any statute, decrees the sale of assets of a corporation although it is a solvent going concern, because the past repeated unconscionable conduct of dominating stockholders makes it highly improbable that the improper use of their power will ever cease" (citing cases).

[22] In a unanimous opinion this Court said:

> ". . . [U]nder our more recent decisions any state or federal law requiring applicants for any job to be turned away because of their color would be invalid under the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment."

Colorado Anti-Discrimination Commission v. *Continental Air Lines*, 372 U. S. 714, 721.

See also, *Johnson* v. *Virginia*, 373 U. S. 61 (courtroom); *Bailey* v. *Patterson*, 369 U. S. 31 (transportation); *Peterson* v. *Greenville*,

nation in the hiring and assignment of public school teachers surely violates the teachers' rights. The defendants cannot seriously contend to the contrary. The only possible justification for withholding relief is that petitioners who are public school pupils are not entitled to invoke the aid of the courts to halt the admittedly unlawful practice. Petitioners submit that the unlawful practice is closely linked to their right under *Brown* v. *Board of Education*, 349 U. S. 297, to have the district courts supervise the effectuation of "a racially nondiscriminatory *school system*" (349 U. S. at 301, emphasis added). The Court in deciding the second *Brown* case, *supra*, pointed to administrative problems related to "the physical condition of the school plant, the school transportation system, *personnel*, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations . . . ", as matters to be considered in appraising the time necessary for good faith compliance (emphasis added). We believe that the Court plainly regarded the task as one of ending all discrimination in school systems, including discrimination in the transportation system, attendance districts or the other factors mentioned. The delay countenanced by the "deliberate speed" doctrine was predicated on the assumption that dual school systems would be reorganized.

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373 U. S. 244 (restaurant); *Turner* v. *Memphis*, 369 U. S. 350 (airport restaurant); *Browder* v. *Gayle*, 352 U. S. 903 (buses); *Griffin* v. *School Board of Prince Edward County*, 377 U. S. 218 (schools); *Dawson* v. *Baltimore City*, 350 U. S. 877 (municipal beaches); *Holmes* v. *Atlanta*, 350 U. S. 879 (municipal golf courses).

The brief of the United States, as *amicus curiae,* in *Calhoun* v. *Latimer,* 377 U. S. 263, argued in this Court that:

> Obviously, a public school system cannot be truly nondiscriminatory if the school board assigns school personnel on the basis of race. Full desegregation can never be achieved if certain schools continue to have all-Negro faculties while others have all-white faculties. Schools will continue to be known as "white schools" or "Negro schools" depending on the racial composition of their faculties. It follows that the school authorities must take steps to eliminate segregation of personnel as well as pupils. (Brief of the United States, pp. 39-40.)

The Court in *Calhoun* vacated the judgment without discussion of this issue. We submit that this case presents an appropriate occasion to consider this question.

The record indicates the complete segregation of school faculties and the general personnel policies of the school system (see pp. 7-8, *supra*). Virginia law, and the personnel policies of Richmond, authorize the superintendent to assign and reassign teachers and other staff serving the pupils. Code of Va. 1950 (1964 Replacement Vol.), §22-205.[23]

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[23] Section 22-205 provides:

> Assignment of teachers, including principals, by superintendent.—The division superintendent shall have authority to assign to their respective positions in the school wherein they have been placed by the school board all teachers, including principals, and reassign them therein, provided no change or reassignment shall affect the salary of such teachers; and provided, further, that he shall make appropriate reports and explanations on the request of the school board.

Another Virginia law enacted in 1962, Code of Va. 1950 (1964 Replacement Vol.), §22-207, plainly encourages teacher segregation by expressly authorizing teachers to terminate their contracts with school boards if pupils or teachers at their schools are desegregated.[24] This law, plainly enacted in defiance of *Brown,* shows the link between teacher and pupil segregation in segregationists' thinking.

But the Fourth Circuit has not stated its disapproval of faculty segregation in any of the cases in which it has considered the matter[25] and apparently has adopted the view

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[24] §22-207. Written contracts with teachers required; termination by teachers.—Written contracts shall be made by the school board with all public school teachers, except those temporarily employed as substitute teachers, before they enter upon their duties, in a form to be prescribed by the Superintendent of Public Instruction. Such contracts shall be signed in duplicate, each party holding a copy thereof.

Every such contract hereafter entered into, whether or not expressly provided therein, may be terminated by the teacher, by notice in writing to the local school board, *at any time after both white and Negro pupils shall have been enrolled, or both white and Negro teachers shall have been employed,* in the school to which the contracting teacher is assigned. (Emphasis supplied.)

(The second paragraph was added by a 1962 amendment; Acts of Va. 1962, chapter 183.)

[25] Faculty segregation was first considered by the Fourth Circuit in *Jackson* v. *School Board of the City of Lynchburg,* 321 F. 2d 230, 233 (4th Cir. 1963), where it held that a complaint asking for desegregation of a school system was sufficient to raise the question. See also, *Griffin* v. *Board of Supervisors,* 339 F. 2d 486, 493 (4th Cir. 1964); *Bowditch* v. *Buncombe County Board of Ed.,* 345 F. 2d 329, 332, 333 (4th Cir. 1965); *Wheeler* v. *Durham City Board of Education,* —— F. 2d —— (4th Cir. No. 9630, June 1, 1965), and *Gilliam* v. *School Board of City of Hopewell,* 345 F. 2d 325 (4th Cir. 1965).

In the Fifth Circuit see: *Board of Public Instruction of Duval County* v. *Braxton,* 326 F. 2d 616, 620 (5th Cir. 1964), *cert.*

that faculty desegregation must depend upon some kind of evidentiary showing by plaintiff Negro pupils that they are disadvantaged by the practice in the circumstances of the particular case. That is the only reasonable explanation for the Fourth Circuit's repeated statements in cases where the existence of faculty segregation is undisputed, that there was insufficient showing that faculty segregation was a denial of plaintiffs' constitutional rights. The Fourth Circuit apparently accepts the standing of pupils to litigate the question but demands that they prove that faculty segregation is a discrimination against them—as opposed to a discrimination against the teachers themselves.

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denied 377 U. S. 924 (affirming a trial court order requiring a faculty desegregation plan). See also *Augustus* v. *Board of Public Instruction of Escambia County*, 306 F. 2d 862 (5th Cir. 1962); *Calhoun* v. *Latimer*, 321 F. 2d 302 (5th Cir. 1963), *vacated and remanded* 377 U. S. 263.

The Sixth Circuit has twice held that it was proper for pupils and their parents to raise the issue of segregation of teachers. *Mapp* v. *Board of Education of City of Chattanooga*, 319 F. 2d 571, 576 (6th Cir. 1963); *Northcross* v. *Board of Education of City of Memphis*, 333 F. 2d 661, 666 (6th Cir. 1964).

Several other courts have discussed the question of segregation of teachers with a variety of results. *Brooks* v. *School District of City of Moberly, Mo.*, 267 F. 2d 733 (8th Cir. 1959), *cert. denied* 361 U. S. 894 (1959) (teacher firing); *Franklin* v. *County Scool Board of Giles County*, Civil No. 64-C-73-R, W. D .Va., June 3, 1965 (same); *Christmas* v. *Board of Education of Harford County*, 231 F. Supp. 331 (D. Md. 1964); *Nesbit* v. *Statesville City Board of Education*, 232 F. Supp. 288 (W. D. N. C. 1964), vacated, 345 F. 2d 333 (4th Cir. 1965); *Tillman* v. *Board of Instruction of Volusia County, Florida*, Civil No. 4501, 7 Race Rel. L. Rep. 687 (S. D. Fla. 1962); *Manning* v. *Board of Public Instruction of Hillsborough County, Fla.*, Civil No. 3554, 7 Race Rel. L. Rep. 681 (S. D. Fla. 1962); *Lawrence* v. *Bowling Green, Ky. Board of Education*, Civil No. 819, 8 Race Rel. L. Rep. 74 (N. D. Ky. 1963); *Mason* v. *Jessamine County, Ky. Board of Education*, Civil No. 1496, 8 Race Rel. L. Rep. 75 (E. D. Ky. 1963); *Dowell* v. *School Board of Oklahoma City Public Schools*, 219 F. Supp. 427 (N. D. Okla. 1963).

But, as Judges Sobeloff and Bell have said, faculty segregation obviously makes student desegregation more difficult. To the extent that students or parents are given a choice between schools, faculty segregation encourages them to make their choice on a racial basis. The very existence of faculty segregation reflects the school authorities' judgment that the race of teachers is significant and makes a difference. Cf. *Anderson* v. *Martin,* 375 U. S. 399. This is obvious in the context of states where school segregation has been defended vigorously by public officials for a decade since *Brown.*

Faculty segregation assures continuance of the prevailing trend of one-way desegregation, i.e., movement of Negro pupils to formerly white schools without any corresponding movement of white pupils to Negro faculty schools. Throughout the southeast part of the country there are few exceptions to this brand of "desegregation" which leaves the "Negro" school intact with an all-Negro student body and faculty.[26] If the established trend continues it may have extraordinarily serious implications threatening the jobs of large numbers of Negro teachers. They are not assigned to teach white pupils and face the departure of some Negro pupils to white-faculty schools, with a corresponding decrease in demand for their services. A recent decision by Judge Michie in the Western District of Virginia enjoined school authorities who discharged every Negro teacher in a small system when the schools desegregated (*Franklin* v. *School Board of Giles County,* —— F.

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[26] See the comprehensive statistics published by the Southern Education Reporting Service in its periodic "Statistical Summary of School Segregation—Desegregation in the Southern and Border States," 14th Revision, November 1964, *passim.*

Supp. ——, W. D. Va., Civ. No. 64-C-73-R, June 3, 1965). Cases involving Negro teacher discharges coincident with desegregation are pending in district courts in North Carolina, Texas and Oklahoma.

The public importance of the issue is illuminated perhaps by consideration of some societal factors involved. It is estimated that there are 419,199 white teachers and 116,028 Negro teachers in 11 southern states, 6 border states (excluding Maryland) and the District of Columbia.[27] In 1963-64, Virginia public schools employed 31,443 white teachers and 9,051 Negro teachers.[28] There were 733,524 white pupils and 34,176 Negro pupils (total 967,700).[29] Of 128 districts with Negro and white pupils, 81 districts had at least one Negro pupil in school with whites in November 1964, but only five of those districts had Negroes teaching in school with whites.[30] There was no faculty desegregation in Alabama, Georgia, Louisiana, Mississippi and South Carolina.[31] One North Carolina district, 2 Florida districts, and 7 Tennessee districts had some faculty desegregation, and one Arkansas district had a Negro supervisor of elementary schools but no Negro teachers in desegregated classes.[32]

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[27] Southern Education Reporting Service, Statistical Summary of School Segregation-Desegregation (cited *supra*, note 12) (Nov. 1964), p. 2.

[28] *Id.* at 59.

[29] *Ibid.*

[30] *Ibid.* The summary reports: "Some Negro teachers are teaching in schools with whites in Alexandria and Roanoke, and in Arlington and Fairfax Counties. In Prince Edward County, nine of the 68 teachers in the county's one high school and three elementary schools are white."

[31] *Id.* at 2.

[32] *Id.* at 8, 15, 39, 50.

There has been a prolonged national shortage of teachers and the supply of new teachers does not meet the demand.[33] This pattern holds true in Virginia.[34] The N. E. A. Research Division conservatively estimates the national teacher turnover rate at 8.5 percent of teachers withdrawing from teaching annually.[35]

Within the Negro community Negro teachers generally are recognized as having a leadership role with a comparatively high economic position,[36] but their potential as leaders in efforts to promote desegregation of public facilities and schools is limited by the vulnerability of their position as employees of segregationist state agencies.[37] Continued faculty segregation, posing the danger of discharge

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[33] Research Division—National Education Association, Teacher Supply and Demand in Public Schools, 1965 (Research Report 1965-R10, June 1965), *passim*.

[34] *Id.* at 57.

[35] *Id.* at 29.

[36] According to the 1960 census the median income for the non-white family was $3,662, but the median for the non-white family whose head was employed as an elementary or secondary teacher was $6,409 (1960 Census of Population, Vol. I, "Characteristics of the Population," Part I, U. S. Summary, Table 230, pp. 1-611).

[37] Lamanna, Richard A., "The Negro Teacher and Desegregation", Sociological Inquiry, Vol. 35, No. 1, Winter 1965. Alabama has enacted 7 laws to permit firing of teachers who advocate desegregation (1956 1st Sp. Sess., Acts 40, 41; 1957 Sess., Act 239, 361; 1961 Sp. Sess., Acts 249, 383, 443). Arkansas laws prohibited NAACP members from holding public employment and required teachers to list organization membership until *Shelton* v. *Tucker*, 364 U. S. 479. A series of Louisiana laws provided for dismissal of public employees advocating integration (La. Acts 1956, Acts 248, 249, 250, 252). Until challenged in court South Carolina barred public employment of NAACP members (S. C. Acts 1956, Act 741), repealed by Act 223 of 1957. See *Bryan* v. *Austin*, 148 F. Supp. 563 (E. D. S. C. 1957), judgment vacated 354 U. S. 933.

of Negro teachers as Negro pupils go to white schools where no Negro teachers are assigned threatens potentially disastrous social consequences for one of the most important social and economic groups in Negro communities in the South.

Petitioners submit that faculty segregation *per se* violates the constitutional rights of Negro pupils because of its inevitable tendency to impede desegregation of pupils. In recognition of this the United States Commissioner of Education, implementing Title VI of the Civil Rights Act of 1964,[38] has announced the following ruling to all school districts submitting plans for desegregation in order to qualify for federal financial aid (General Policy Statement, *supra*, Part V. B.):

> 1. *Faculty and staff desegregation.* All desegregation plans shall provide for the desegregation of faculty and staff in accordance with the following requirements:
>
> a. *Initial assignments.* The race, color, or national origin of pupils shall not be a factor in the assignment to a particular school or class within a school of teachers, administrators or other employees who serve pupils.
>
> b. *Segregation resulting from prior discriminatory assignments.* Steps shall also be taken toward the elimination of segregation of teaching and staff personnel in the school resulting from prior assignments based on race, color, or national origin (see also, V. E. 4(b)).

[38] 42 U. S. C. A. §2000d.

The General Policy Statement also indicates that it will not accept an "Assurance of Compliance" (HEW Form 441) from any school system in which "teachers or other staff who serve pupils remain segregated." We submit that the determination by the United States Commissioner of Education that faculty desegregation must be included in order for a desegregation plan to be "adequate to accomplish the purposes of the Civil Rights Act" is entitled to substantial weight. But beyond that the Commissioner's determination implements the clear intent of the Congressional proponents of Title VI. See Vice President (then Senator) Humphrey's interpretation of Title VI quoted *supra*, pp. 17-18.

The Fourth Circuit has not indicated that there is any justification for the policy of assigning teachers on the basis of the race of the pupils, and the school authorities have not suggested any. Nor have the school authorities made any effort to establish that there are administrative obstacles to faculty desegregation justifying delay under the doctrine of the second *Brown* decision (349 U. S. at 300-01).

A policy of assigning teachers to schools on the basis of the race of the pupils is plainly invidious even without regard to its effect on what schools various pupils attend. Pupils admitted to public schools are entitled to be treated alike without racial differentiations in those schools. *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637. The student's relationship with teachers is central to the educational experience in public schools. When a state decrees that those Negro pupils in all-Negro schools be taught only by Negro teachers and that those Negro pupils in schools

with white children be taught only by white teachers, it significantly perpetuates the segregation of Negro Americans in their educational experience. This is contrary to the egalitarian principle of the Fourteenth Amendment and the teaching of *Brown* that segregated education is "inherently unequal."

The issues presented by the "freedom of choice" plans and the faculty segregation issue merge into a common problem of vital importance to the implementation of the *Brown* decision, and are worthy of the attention of this Court.

CONCLUSION

Wherefore, for the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Memorandum of the Court

[July 25, 1962]

Eleven Negro students, their parents and guardians instituted this action to require the defendants to transfer the students from Negro public schools to white public schools. The plaintiffs also pray, on behalf of all persons similarly situated, that the defendants be enjoined from operating racially segregated schools and that the defendants be required to submit to the Court a plan of desegregation.

The Pupil Placement Board answered, admitting that the plaintiffs had complied with its regulations for transfer and denying the other allegations of the complaint. The City School Board and the Superintendent of Schools answered and moved to dismiss on the ground that sole responsibility for the placement of pupils rested with the Pupil Placement Board pursuant to the Pupil Placement Act of Virginia, Sections 22-232.1 through 232.17 of the Code of Virginia, as amended.

The defendants interpreted the bill of complaint as attacking the constitutionality of the Pupil Placement Act and moved to dismiss on the ground that its constitutionality should first be determined by the Supreme Court of Appeals of Virginia, or the case should be heard by a district court of three judges.

The evidence disclosed that the City of Richmond is divided into a number of geographically defined attendance areas for both white and Negro schools. These areas were established by the School Board prior to 1954 and have not

been changed in a material way since that time. Several areas for white and Negro schools overlap. The Pupil Placement Board enrolls and transfers all students. Neither the Richmond School Board nor the Superintendent makes recommendations to the Pupil Placement Board.

During the 1961-1962 school term, thirty-seven Negro students were assigned to white schools. For the 1962-1963 school term, ninety additional students have been assigned. At the start of the 1962-1963 school term all of the white high schools will have Negro students in attendance. Negro students will also attend several of the white junior high schools and elementary schools.

Rigid adherence to placement of students by attendance areas has been modified in four respects. First, the Chairman of the Pupil Placement Board testified that any Negro child applying for enrollment in the first grade of a white public school in his attendance area is assigned to that school. Second, the Superintendent of Schools testified that George Wythe High School and John Marshall High School had been constructed to accommodate all high school students in their respective attendance areas. Counsel stated in argument that six Negro students had applied for admission to George Wythe High School for 1962 and all had been accepted. Third, a Negro student presently attending a white school, upon promotion to a higher school, is routinely assigned to a white school. Fourth, some Negro students have been assigned to schools in white attendance areas.

Usually, however, assignments of students based on promotion from an elementary school to a junior high school

and from junior high to high school are routinely made by the Pupil Placement Board. These assignments generally follow a pattern, aptly described as a system of "feeder schools," that existed prior to 1954. Thus, a student from a white elementary school is routinely promoted to a white junior high school and in due course to a white high school. A Negro student is routinely promoted from a Negro elementary school to a Negro junior high school and finally a Negro high school. In order to change the normal course of assignment based on promotion all students must apply to the Pupil Placement Board. The majority of the plaintiffs in the present case are such applicants.

The Chairman of the Pupil Placement Board testified that 98 per cent of the applications were of a routine nature and were handled by the staff of the Board. The remaining 2 per cent, divided about equally between white and Negro applicants, requested transfers from one school to another outside of the regular routine. These percentages applied to the entire state, but there was no evidence that they varied materially for the City of Richmond.

First to be determined are the defendants' motions to dismiss on the ground that the case involves the constitutionality of the Pupil Placement Act. The plaintiffs have made no challenge of the constitutionality of the Act, and the motions are denied.

The second issue is the joinder of the School Board and Superintendent of Schools. The State Pupil Placement Board has authority over the placement of pupils, and the local officials refrain from making recommendations to the Board, but approximately 98 per cent of the placements

are made routinely as a result of the regulations of the School Board pertaining to attendance areas. The evidence shows that the State Pupil Placement Board has no inclination to vary these attendance areas, although undoubtedly it has authority to do so. In view of this situation, the School Board and the Superintendent of Schools are proper parties.

The next issue concerns the plaintiffs' applications. The Court was advised that Lemuel Wimbish, Jr. has been assigned to Chandler Junior High School to which he had made application. His case is moot.

The following students who have completed elementary school seek admission to Chandler Junior High School: Carolyn Bradley, Rosalind Dobson, John Edward Johnson, Jr., and William Dunbar Quarles, Jr.

The State Pupil Placement Board, after comparing test scores of these students with test scores of other students, denied the applications on the ground of lack of academic qualifications. The plaintiffs do not challenge the tests or the method of comparison used by the State Pupil Placement Board. The plaintiffs emphasize, however, that students from white elementary schools in the same attendance area are placed routinely in Chandler Junior High School, and their scores are not scrutinized by the State Pupil Placement Board. On the other hand, the plaintiffs, because they sought transfer based on promotion from a Negro elementary school, are screened by the State Pupil Placement Board. This is a valid criticism of the procedure inherent in the system of "feeder schools."

Proper scholastic tests may be used to determine the placement of students. But when the tests are applied only to Negroes seeking admission to particular schools and not to white students routinely assigned to the same schools, the use of the tests cannot be sustained. *Jones* v. *School Board of Alexandria,* 278 F. 2d 72 (4th Cir. 1960).

Plaintiff, Morgan N. Jackson, who was promoted from Graves Junior High School, seeks admission to John Marshall High School. His application was denied because he lives thirteen blocks from the John Marshall High School and five blocks from a Negro high school. The plaintiffs point out that he lives in the attendance area of John Marshall High School, and had he been a white student he would have been routinely assigned to John Marshall High School without determination of whether his residence was closer to that high school or any other high school. Residence may be a proper basis for assignment of pupils, but it is an invalid criteria when linked to a system of "feeder schools." *Dodson* v. *School Board of the City of Charlottesville,* 289 F. 2d 439 (4th Cir. 1961).

The third group of plaintiffs, namely, Michael Bradley, Daria A. Cameron, Bruce W. Johnson, Phyllis Antoinette Johnson and Robert S. Meyers, seek to transfer from Graves Junior High School to Chandler Junior High School. They were denied transfer because of lack of academic qualifications. The evidence showed that the same standards for determining transfer from one junior high school to another junior high school were applied by the Board indiscriminately to both white and colored students. Were this the only factor in this phase of the case, the issue

would involve only judicial review of the decision of an administrative board. However, the situation of these plaintiffs must be considered in the context of the system of "feeder schools," which routinely placed them in the Graves Junior High School while white students routinely were placed in Chandler Junior High School. The application of scholarship qualifications under these circumstances is discriminatory. *Green* v. *School Board of the City of Roanoke,* —— F. 2d —— (4th Cir., May 22, 1962).

The foregoing facts and conclusions of law require the admission of the plaintiffs to the schools for which they made application.

The plaintiffs prayed that the defendants be enjoined from continued discrimination in the city schools and that the School Board be required to submit a desegregation plan. The Court has weighed all of the factors presented by the evidence in this case and finds that the defendants have taken measures to eliminate racially discriminatory enrollments in the first grade. Apparently they are eliminating discriminatory enrollments in George Wythe High School and they are routinely assigning Negro students in white junior high schools to white high schools.

While the School Board has not presented a formal plan of desegregation, the Court finds that the defendants have made a reasonable start toward a non-discriminatory school system resulting in the attendance of 127 Negro students in white schools for the 1962-1963 school term. In view of the steps that have been taken in this direction, the Court concludes that the defendants should be allowed discretion

to fashion within a reasonable time the changes necessary to eliminate the remaining objectionable features of the system of "feeder schools."

In *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955), the Supreme Court stated "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." The Court is of the opinion that the relief decreed in this case is sufficient at this time in view of the evidence presented. The refusal of broad injunctive relief now is not to be construed as approval to continue the "feeder school system" as it is now operated. See *Hill* v. *School Board of the City of Norfolk, Virginia*, 282 F. 2d 473 (4th Cir. 1960); *Dodson* v. *School Board of the City of Charlottesville*, 289 F. 2d 439 (4th Cir. 1961).

This case will be retained on the docket for such further relief as may be appropriate.

JOHN D. BUTZNER, JR.
United States District Judge

Richmond, Virginia
July 25, 1962

Decree

This cause came on to be heard upon the bill of complaint, the amended complaint, the several motions to dismiss and answers filed by the Pupil Placement Board of the Commonwealth of Virginia and the School Board of the City of Richmond and the Division Superintendent of Schools, the depositions of witnesses duly taken and filed, the testimony of witnesses heard ore tenus and exhibits; and was argued by counsel.

Upon consideration whereof, for reasons appearing in the Memorandum of the Court this day made a part of the record, the Court doth ADJUDGE, ORDER and DECREE as follows:

1. The motions to dismiss are denied.

2. The defendants, and each of them, are enjoined and restrained from denying Carolyn Bradley, Michael Bradley, Daria A. Cameron, Rosalind Dobson, Bruce W. Johnson, John Edward Johnson, Jr., Phyllis Antoinette Johnson, Robert S. Meyers and William Dunbar Quarles, Jr., admission to Chandler Junior High School, and from denying Morgan N. Jackson admission to John Marshall High School.

3. The prayer of the plaintiffs for further injunctive relief is denied at this time.

4. This cause is retained on the docket, with leave of any party, or of persons constituting a class with the plaintiffs, to petition for appropriate relief.

JOHN D. BUTZNER, JR.
United States District Judge

Richmond, Virginia
July 25, 1962

Opinion of Boreman, *U.S.C.J.*

UNITED STATES COURT OF APPEALS

FOURTH CIRCUIT

No. 8757

Argued Jan. 9, 1963

Decided May 10, 1963

MINERVA BRADLEY, I. A. JACKSON, JR., ROSA LEE QUARLES, JOHN EDWARD JOHNSON, ELIHU C. MYERS and ELIZABETH S. MYERS,

Appellants,

—v.—

THE SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, H. I. WILLET, Division Superintendent of Schools of the City of Richmond, Virginia, and E. J. OGLESBY, ALFRED L. WINGO and E. T. JUSTIS, individually and constituting the Pupil Placement Board of the Commonwealth of Virginia,

Appellees.

Henry L. Marsh, III, Richmond, Va. (S. W. Tucker, Richmond, Va., on brief) for appellants.

Henry T. Wickham, Sp. Counsel, City of Richmond J. Elliott Drinard, City Atty., Richmond, Va. and Tucker, Mays, Moore & Reed, Richmond, Va., on brief) for appellees, The School Board of the City of Richmond, Virginia, and H. I. Willet, Division Superintendent of Schools.